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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. ____

ANA SARRACEN,

Petitioner,

v.

LAWRENCE APPLEBY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. ____

ANA SARRACEN,

Petitioner,

v.

LAWRENCE APPLEBY, et al.,

Respondents.

QUESTION PRESENTED FOR REVIEW

Whether the opinion below reversing a jury verdict for the Plaintiff unreasonably limits statements by a co-conspirator by excluding a statement made by a co-conspirator to a third party which defined the scope of, reason for, and orginators of the conspiracy as being "'casual comments which were neither intended to further nor had the effect of furthering the conspiracy in any way?'"

PARTIES

The parties in this case are the Plaintiff-Appellee in the United States Court of Appeals and the Petitioner herein, Ana Sarracen, and the Defendants-Appellants in the United States Court of Appeals for the Seventh Circuit and the Respondents herein, Lawrence Appleby and Margaret Sondler. There were two other parties at trial at the United States District Court, Albert Portis and Barbara Lilly, who, after the verdict in the Court below, entered into a settlement agreement with the Plaintiff.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is an unpublished Order pursuant to Circuit Rule 35. It is appended.

JURISDICTION

The Judgement of the United States Court of Appeals for the Seventh Circuit was entered on 5 July, 1983 affirming a decision of the Court below which was entered on 29 March, 1985. A Petition for Rehearing was timely filed and denied on 18 April, 1985. Jurisdiction to review the Opinion and Judgement of the United States Court of Appeals was conferred upon this Court by 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence, 801(d)(2)(E):

> "A statement is not hearsay if---(2) The statement is offered against a party and is ---(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

Stripped to their bare essentials for purposes of this Petition, the facts show that Ana Sarracen was a refugee from Cuba who worked her way through college and graduate school and became a mental health worker for private, not-for-profit agencies funded almost entirely by the Illinois Department of Mental Health and Developmental Disabilities. (TR 30-8)[*1] For most of 1981, Ana Sarracen was employed by the Edgewater Uptown Community Mental Health Center (E/U) from which she resigned in January, 1982

[*1]The jury below heard extensive and contradictory testimony from the witnesses. Each of the four Defendants testified both as adverse witnesses and in their own defense. One of the Defendants, Barbara Lilly, testified on three occasions. Since there is only a narrow question on review--that is the propriety of the co-conspirator statements--the Petitioner will include only that portion of the Statement of Facts necessary to set a background for that statement. While the Opinion of the United States Court of Appeals for the Seventh Circuit does not contain a complete statement of facts, it does present an accurate statement. The Opinion of the United States Court of Appeals is appended herein.

while criticizing in writing her immediate superior for allegedly pressuring her (unsuccessfully) on at least three occasions to falsify records to make it look as if E/U was servicing more patients than it actually had. (See page 4, Appendix (Opinion below)) (TR 45-49) She applied for and received a job at the Christian Action Ministry Community Mental Health Center (CAM) in February, 1982, and began working at CAM on February 22, 1982. (See page 5, Appendix (Opinion below)) When she applied for the job, Ms. Sarracen presented a resume which was not up-to-date and did not include Edgewater Uptown. On the day she began work, she filled out an application but she did not list E/U as her last place of employment. According to Sarracen, she did not list E/U because Defendant Lilly told her to omit that information, a fact which Defendant Lilly denied. (See page 10, Appendix (Opinion below))

At the trial, all the Defendants admitted that either by the date Ms. Sarracen began work

or within several days thereafter, they all knew that Ms. Sarracen had, in fact, been employed by E/U. (See page 11, Appendix (Opinion below))

The Plaintiff's immediate superiors at CAM were Defendant Barbara Lilly and Defendant Albert Portis, both of whom testified both as adverse witnesses and in their own defense. Ms. Lilly had testified in her deposition that on the 5th of March at approximately 3 p.m. she received a call from Defendant Margaret Sondler asking if Sarracen had worked for E/U. (See page 12, Appendix (Opinion below)) (TR 137, 138) At the trial, she changed her testimony and stated that the call really came on February 26. (See page 12, Appendix (Opinion below))

On that same date, March 5, 1982, Sister Annamarie Kane, a Roman Catholic nun of 27 years and a member of the board of E/U, had a meeting with Defendant Appleby at 2 p.m. at Sister Annamarie's lawyer's office. At that meeting, Sister Annamarie sought a financial audit to deter-

mine to what extent allegations of misconduct might be true. (TR 124) Defendant Appleby asked Sister Annamarie, "who is giving you the information?" (TR 124) Sister Annamarie refused to give Appleby the information because she wasn't sure that the jobs of the individuals who gave her the information would be safe. (TR 124) Because of this, according to Sister Annamarie, Defendant Appleby refused to order a financial audit. (TR 125) Sister Annamarie and Lawrence Appleby both confirmed that the meeting began at 2 p.m. and lasted about 20 minutes. (TR 385)

It was the Plaintiff's theory of the case that Defendant Appleby reached the (wrong) conclusion that because of her remarks in the E/U file concerning falsification of records, it was Ana Sarracen who gave Sister Annamarie the information concerning false records at E/U. For this reason, Defendant Appleby ordered Defendants Lilly and Portis of CAM to fire Ana Sarracen.

It was the Defendants' contention that Ana Sarracen was fired because she had lied on her application. There was much testimony both by the parties themselves and additional witnesses concerning both theories of the case.

Among the testimonial statements were one by the Defendant concerning a statement that Barbara Lilly made about the other Defendants and one statement by a third party, Helen Glick, an employee of CAM, concerning another statement by Barbara Lilly. These statements were admitted by the Court after the Court determined by a preponderance of the evidence that a conspiracy existed. (TR 403-428)

Sarracen was permitted to testify that early in March Defendant Lilly called her into Lilly's office and told her (Sarracen) "that Appleby had called Portis and ordered him to fire---(Sarracen) because of the comments---(she) had written criticizing Edgewater-Uptown and that it could hurt him---he was going to---tell other people that---(she) was fired---be-

cause (she) omitted information in---(her) resume." (See page 23, Appendix (Opinion below))

Helen Glick, a social worker with CAM, testified that she had known Ana Sarracen for less than a month at the time of Ms. Sarracen's termination on March 19, 1982.*2 Glick testified that on March 19 she found Ana Sarracen in tears and after driving Ms. Sarracen home, returned to the office and approached Barbara Lilly. Glick testified that Lilly told her that Sarracen had written a memorandum at her previous employment and "--that her termination was connected to that memo." Glick then testified, "--then, she (Lilly) said Ms. Sarracen was being blackballed, she used the word 'blackballed', by someone at Subregion 5, and that Marge had insisted for about a month that Sarracen be terminated from the agency." (See page 23, Appendix (Opinion below)) (TR 245, 246)

*2According to her letter of termination, Ms. Sarracen was terminated on March 22, 1982, effective in April, 1982. (See page 19, Appendix (Opinion below))

The jury returned a verdict of $110,000 in actual damages jointly against all four Defendants and $150,000 in punitive damages against Defendant Appleby, $150,000 in punitive damages against Defendant Sondler, $500 in punitive damages against Defendant Portis and $500 in punitive damages against Defendant Lilly. The Court remitted the jury's verdict to $30,000 in actual damages against all four Defendants and $30,000 in punitive damages against Appleby and Sondler and $500 in punitive damages against Portis and Lilly. Portis and Lilly did not appeal the Court's judgement.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed and remanded for a new trial stating that no reasonable basis existed to conclude that either of Lilly's remarks to Sarracen or to Glick could possibly have been intended to aid in the termination of the Plaintiff. Because of this, the Court reasoned that the statements did not further the goals of the conspiracy and remanded

the cause for a new trial.

The decision of the United States Court of Appeals for the Seventh Circuit was entered on 29 March, 1985. A Petition for rehearing was timely filed and was denied on 18 April, 1985.

ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT MERITS REVIEW BECAUSE IT GIVES THIS COURT THE OPPORTUNITY TO SET FORTH GUIDELINES DETERMINING HOW, WHEN, AND UNDER WHAT CIRCUMSTANCES STATEMENTS BY CO-CONSPIRATORS DEFINING THE SCOPE OF A CONSPIRACY, NAMING CO-CONSPIRATORS AND SETTING FORTH THE REASONS FOR THE CONSPIRACY MAY OR MAY NOT BE ADMITTED AS BEING IN FURTHERANCE OF THE CONSPIRACY.

One of the problems in analyzing the "in furtherance of" requirement is that most of the cases, including the most recent cases heard by this Court, arise within the criminal context. (Krulewitch v. US, 336 US 440 (1949); Dutton v. Evans, 400 US 74 (1970); Wong Sun v. US, 371 US 471 (1963); Lutwak v. US, 344 US 604 (1953)) All of the cases cited by the Court below in its Opinion were criminal cases. The Petitioner

does not suggest that statements in civil conspiracy cases should be more liberally construed but, since the goals of a civil conspiracy usually are significantly different than those of a criminal conspiracy, the analysis for determining whether a statement of a co-conspirator furthers the conspiracy, will be different. That is particularly true in a First Amendment case.

In reversing, the Seventh Circuit stated that Ms. Lilly's conversation was nothing more than casual comments which did not further the conspiracy. This may be a proper analysis of a criminal case where the goals of a conspiracy may be to sell narcotics but not to admit one's guilt or define the scope of narcotic traffic to a third party but not in a First Amendment case where the broader goal of any conspiracy is not simply to silence the individual by terminating her--as here--but also to quell dissent within employee ranks.

The Court below answered this argument by

stating that the complaint alleged only that the Defendants conspired to fire (Sarracen) in retaliation for her comments about Edgewater-Uptown. However, the Court did admit that the complaint does not circumscribe the bounds of the conspiracy which may be proved at trial. (See page 28, Appendix (Opinion below)) See also, Brandon v. Holt, --US-- 105 S. Ct. 873 (1985). However, the Court then argued that "--most of the evidence adduced at trial went exclusively to the issue of whether the Defendants were retaliating against Sarracen--" and that there was little evidence suggesting that the Defendants were generally intent on suppressing their employees' First Amendment rights.*3 (See page 29, Appendix (Opinion below))

*3Counsel for the Petitioner argued both outside the presence of the jury (TR 428) and in closing argument (Page 64 of the Closing Argument) that, indeed, a larger goal of the conspiracy was to intimidate other employees by using Ms. Sarracen as an example.

This argument avoids the implications in any First Amendment case. Getting rid of Ms. Sarracen, an admittedly small potato within the state mental health framework, accomplished little. The real goal of the conspiracy--as in practically all First Amendment conspiracies--is to send out the word to other potential troublemakers so that they will not be just that--troublemakers. While it is probably true that Ms. Lilly's conversation with Helen Glick was not planned, it is arguable that this is precisely the type of conversation which Defendants Appleby and Sondler believed and even hoped would happen when Sarracen was terminated. The conversation was, in effect, a "let this be a lesson to you" piece of of advice from Ms. Lilly to Helen Glick.

A review of this case would assist in setting standards for admitting co-conspirator admissions in criminal cases as well. Ironically, some opinions in criminal cases show a more reasonable approach than here. (US v. James, 510

F 2d 546, 549 (5th Cir., 1975)) "Although this phrase (in furtherance of) has a talismanic ring to it, we must not apply the standard too strictly, lest we defeat the purpose of the exception. See also, US v. Patton, 549 F 2d 444, 447 (5th Cir., 1979) and US v. McGuire, 608 F 2d 1028, 1032 (5th Cir., 1980) where the Court of Appeals cited with approval the trial court's statement that the in furtherance of requirement cannot be treated in a literal sense. See ftnte. 5, US v. Lampros, 564 F 2d 26, 30 (8th Cir., 1977) where the Eighth Circuit pointed out:

> "This Court has repeatedly held that statements of a co-conspirator identifying a fellow co-conspirator as his source of narcotics are statements made in furtherance of the conspiracy." (Citations omitted) (See also, US v. Handy, 668 F 2d 407, 408 (8th Cir., 1982))

Both the Ninth and Seventh Circuits also seem to have stretched the "in furtherance of" requirement to permit statements regarding the scope of narcotics transactions. (US v. Sandoval-Villalvazo, 620 F 2d 744 (9th Cir., 1980)

and US v. Regilio, 669 F 2d 1165, 1175-1177 (7th Cir., 1981))

While there might be compelling Fifth and Sixth Amendment reasons to limit the scope of co-conspirator statements in criminal cases, these reasons are non-existent in civil cases. In the present case, for instance, all four Defendants were called as adverse witnesses by the Plaintiffs and examined extensively at that time by both the Plaintiff and Defendant. The Defendants were again called by each of their own lawyers and, again, extensively cross-examined. In addition, Defendant Lilly was called on a third occasion. All counsel vigorously cross-examined Helen Glick and the Petitioner concerning the statements.

Earlier civil conspiracy cases seem to have interpreted statements explaining the purpose and/or scope of the conspiracy as being in furtherance of it. (Connecticut Mutual Life Ins. Co., v. Hillmon, 188 US 208, 218 (1903); Hitchman Coal and Coke Co. v. Mitchell, 245 US 229,

249, 250 (1917)) See also, Committee Comments on both Rules 801(d)(2)(D) and (E). The Petitioner cites Committee Comments on 801(d)(2)(D) since it appears the whole reason for the admissibility of statements of co-conspirators in hearsay trials as well as the in furtherance of requirement is based primarily on rules of agency. (See Lutwak, Supra, at pg. 617) Of course, in a civil case, the agency analogy is even more appropriate.

The present case thus offers this Court the opportunity for analyzing and setting forth guidelines of under what circumstances admissions and statements of co-conspirators setting forth the aims and scope of a conspiracy would be admitted into evidence as furthering the conspiracy. It will also permit the Court to analyze different approaches, if any, in admitting such statements in civil and criminal cases. The Petitioner contends that the Court below took an unrealistically narrow view of the in furtherance of requirement. In the words of

Mr. Justice Harlan, accomplishing "--the main object of a conspiracy will seldom terminate the community of interest of the conspirators. Declarations against that interest evince some likelihood of trustworthiness." (Dutton v. Evans, Supra, at pg. 99, concurring Opinion of Harlan, J.)

For the above reasons, the Petitioner respectfully asks that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Argued November 16, 1984

March 29, 1985

Unpublished Order - Not to be Cited Per Rule 35

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Luther M. Swygert, Senior Circuit J

ANA SARRACEN,	) Appeal From The
Plaintiff-Appellee,	) United States
	) District Court
v.	) for the Northern
	) District of Illi
LAWRENCE APPLEBY, et al.,	) nois, Eastern
	) Division,
Defendants-Appellants.	) No. 82 C 2009
NO. 84 -1323	) Paul E. Plunkett
	) Judge Presiding

O R D E R

Plaintiff, Ana Sarracen, brought this action pursuant to 42 USC, 1983 (1982), against two employees of the Illinois Department of Mental Health, State defendants Lawrence Appleby and Margaret Sondler, and two employees of the Christian Action Missionary (CAM), defendants

Alfred Portis and Barbara Lilly. Sarracen alleged that the four defendants deprived her of her First Amendment rights by conspiring to effectuate her dismissal from CAM because she had previously disclosed fradulent recordkeeping practices at Edgewater-Uptown Mental Health Center, her prior place of employment. She alleged that Appleby exercised some supervisory authority over the Edgewater-Uptown facility, a partially state-funded institution, and that her disclosures regarding the recordkeeping practices embarrassed Appleby. She further alleged that as a result of her disclosures, Appleby requested Portis to order Lilly to discharge Sarracen on the pretext that she had misrepresented herself by failing to disclose on her resume and her employment application that she had previously worked at Edgewater-Uptown. Portis complied with Appleby's request because he feared that Appleby would cut off CAM's state funding.

The jury returned a verdict in favor of Sarracen. Rather than face a new trial, Sarracen

agreed to a remittitur of compensatory damages from $110,000 to $30,000 and of punitive damages from $301,000 to $61,000. The compensatory damages were assessed against all four defendants, jointly and severally. Of the $61,000 in punitive damages, Appleby and Sondler were each assessed $30,000; Portis and Lilly were each assessed $500. Of the four defendants, only Appleby and Sondler appealed.

Defendants raise numerous grounds for reversal, only one of which we need consider. We agree with the defendants that the trial judge erroneously admitted two statements of defendant Lilly pursuant to Fed. R. Evid. 801(d)(2)(E) and that the admission of this testimony was not harmless error. We therefore reverse and remand for a new trial.

I

Sarracen's theory was that on March 5, at approximately 2 p.m., Appleby met with a member of the Edgewater-Uptown's Board of Directors who complained of improper recordkeeping proce-

dures at Edgewater-Uptown. Appleby immediately suspected that Sarracen was the informant. Because Appleby was embarrassed by the disclosure, and, perhaps because he was in fear of losing his job, Appleby telephoned Sondler and Portis to tell them to fire Sarracen.

At trial, the following evidence relevant to this theory was presented. In early February, 1982, Ana Sarracen applied to CAM for a job as a bilingual, bicultural mental health worker. Prior to that, she had worked at the Edgewater-Uptown Mental Health Center until January, 1982 when she resigned because she received an unfavorable evaluation from her supervisor, Boris Glickberg, and because Glickberg had unsuccessfully pressured her at least three times to falsify records to make it appear that Edgewater-Uptown serviced more patients than it actually had. Glickberg stated in his evaluation that Sarracen had difficulty dealing with supervision and working in a team setting. In response to Glickberg's evaluation, Sarracen

authored a two page Worker's Comment in which she critically questioned Glickberg's motive in making the statements about her and she alleged that fellow workers at Edgewater-Uptown were falsifying records. Prior to authoring this Worker's Comment, Sarracen had not reported the recordkeeping improprieties to officials at that facility.

Barbara Lilly, the director at CAM, interviewed Sarracen for the position at CAM in early February. At this interview, Sarracen gave Lilly a resume that listed another mental health facility, Back of the Yards, not Edgewater-Uptown, as her last place of employment. Her resume had not been brought up-to-date even though she had actively been seeking new employment for a few weeks before she interviewed at CAM. Sarracen testified that she told Lilly that she had worked at Edgewater-Uptown and she told her about the problems she had there. Lilly denied this. According to Sarracen, Lilly hired her, told her to report for work on February 22, 1982,

and seemed unconcerned about the problems at Edgewater-Uptown. Lilly told her to draw up a new resume and to bring it with her to work on February 22. According to Lilly, she told Sarracen that she would have to forward Sarracen's resume to another person who would decide if Sarracen had the minimum qualifications to work at CAM. Lilly would then be able to tell Sarracen if she was hired.

Lilly forwarded Sarracen's resume along with the resumes of two other persons to Marge Sondler at the Department of Mental Health. Sondler's job required her to review resumes of job applicants at state funded mental health facilities to determine if the applicants had the requisite professional qualifications.

At the initial interview, Lilly also asked for references. Sarracen contacted certain people who sent references to Lilly. Although it is unclear, apparently Faye Price, Mrs. Walker, and Mr. Miller all sent references to Lilly on behalf of Sarracen. All of the recommenda-

tions were favorable. According to Lilly and Sondler, Price said in her reference letter that Sarracen had worked at Back of the Yards until January, 1982. Both Lilly and Sondler denied that Price's letter of recommendation dated February 1981, in which Price noted that Sarracen had worked at Back of the Yards until January, 1981 and that CAM produced from its personnel file on Sarracen, was the one they read in February, 1982. The reference letter they claimed they saw was never introduced into evidence at trial. Lilly herself called Mrs. Walker who gave Sarracen a very complimentary recommendation, although she stated that one of Sarracen's "negatives" was that she was "too sensitive." Lilly also unsuccessfully attempted to reach Price.

After Sondler received the resumes, but before Sondler certified Sarracen for employment, Sondler showed the three resumes to Dr. Lawrence Appleby, a clinical psychologist and the director of Subregion 5 in Region 2 of the Department

of Mental Health, when he came into her office one afternoon to discuss business. At this time, the Department was undergoing a reorganization due to lack of funds that threatened many employee's jobs. Appleby and Sondler ultimately lost their jobs in the spring of 1983 because of the reorganization.

Ordinarily, Appleby did not review the resumes of job applicants, but he and Sondler reviewed Sarracen's because the Department was particularly interested in recruiting bilingual/bicultural mental health therapists to work at CAM. Appleby also saw a recommendation letter from Price and the resumes of the two other job applicants when other employees showed them to him.

On February 21, Appleby talked with his longtime friend, Dr. Sunukjian. He admitted in his deposition he stated that he talked with her either on February 17 or 18. Appleby told Sunukjian that one of her former employees that had recently left Back of the Yards, a person

with a Spanish surname, was applying for a position at CAM. Sunukjian replied that because so few Hispanics worked for the City of Chicago, Appleby must be referring to Sarracen. Sunukjian added that Sarracen had left Back of the Yards a year ago and had started working at Edgewater-Uptown. Appleby said he would verify this at the next Edgewater-Uptown Board meeting the following night. When he attended the meeting, he reviewed the Board's Minutes from the previous meeting and noted that Sarracen had resigned from Edgewater-Uptown in January, 1982. After the Board meeting, Appleby had a drink with another friend, Dr. Kopera. Dr. Kopera told Appleby that Sarracen left Edgewater-Uptown because she did not like her supervisor. The next day, Appleby called Sondler to relay this information and to ask her to tell CAM about it. Sondler testified that at no time during this conversation did Appleby tell Sondler that Sarracen had filed a discrimination suit against Back of the Yards in response to an unfavorable

recommendation she received there or that Sarracen had written devisive comments about Edgewater-Uptown. Lilly, Sondler, Portis and Appleby testified that after this conversation, Appleby never again discussed Sarracen with Lilly, Sondler or Portis.

On February 22, Sarracen reported for work, after being notified that Sondler had cleared her and one other person for employment at CAM. According to Sarracen, Lilly asked her if she had brought in a new resume which listed Edgewater-Uptown as her prior place of employment. Sarracen replied that she had forgotten it, but that she would bring it in later that week. Lilly denied this. Sarracen was then directed to CAM's personnel center to complete an employment application. In filling out that application, Sarracen listed Back of the Yards as her last place of employment and that she had worked there until January, 1982. According to Sarracen, she did not include Edgewater-Uptown in the employment application because Lilly told her to

omit the information. Lilly denied that she told Sarracen to falsify the employment application. According to Sarracen, Lilly's request that she falsify the employment application embarrassed her but she complied. She stated that she simply erred in writing January, 1982 as the date on which she left Back of the Yards. After completing the employment application, Sarracen read it and signed it. She admitted that the application did warn employees that if they gave false answers they might be terminated.

According to Sarracen, on February 25 she brought in the new resume and Lilly asked her to bring in evaluations from Edgewater-Uptown. Lilly gave Sarracen time off on that day to get them. Sarracen went to Edgewater-Uptown, signed a release of information form for two evaluations dated May, 1981 and October, 1981 by one of her two former supervisors, Melquiades David. The third evaluation by Glickberg was not yet on file. Sarracen wnet back on March 1 to get the Glickberg evaluation. Again, she signed a re-

lease of information form. Both release forms, one purportedly signed by Sarracen and a witness, Susan Bloodworth, on February 25, and the other purportedly signed by Sarracen on March 1 were introduced into evidence. Sarracen gave all three evaluations to Lilly on or before March 1.

Lilly claimed that the first time she learned about Sarracen's employment at Edgewater-Uptown was in the afternoon of February 26 when Sondler called to tell her that Appleby had discovered that Sarracen had worked at Edgewater-Uptown until January, 1982. Lilly admitted that in her deposition, she said Sondler called her on March 5, but she explained that she had just recently looked at her calendar and realized that Sondler called her on February 26 and not on March 5. Sondler testified she called Lilly on February 25, although it was possible that she called her on February 26.

Lilly testified that on February 26 she immediately confronted Sarracen with this infor-

mation, and Sarracen denied that she had ever worked there. On Monday, March 1, Sarracen admitted to Lilly that she had lied. Sarracen said that she left Edgewater-Uptown because her supervisor had sexually harrassed her, that she was embarrassed about it, and that that was the reason she had lied. Lilly gave her the rest of that day off to get evaluations from Edgewater-Uptown; she also requested that Sarracen bring in a new resume. Later that day, Sarracen brought Lilly three evaluations and her two pages of critical comments about Edgewater-Uptown. Lilly admitted that the consent for release of information forms from Edgewater-Uptown were purportedly signed on February 25 and March 1.

On March 5, 1982, at 2 p.m., Sister Annamarie Kane, a nun and member of the Board of Directors of Edgewater-Uptown, met with Appleby in Appleby's office. They discussed allegations of improper recordkeeping practices at Edgewater-Uptown and Kane's request that a service audit be conducted.

These practices had been brought to Kane's attention by eight then-current employees at Edgewater-Uptown. Sarracen was not one of the people who gave Kane this information and both Appleby and Kane testified that Sarracen's name was never mentioned at the meeting. Kane testified that Appleby requested the names of the informants, but Kane refused to reveal them, and that Appleby may also have requested the names of programs. Appleby denied that he requested names of informants. The Edgewater-Uptown Board took no action as a result of these allegations, but Appleby reported the matter to his supervisor and recommended that an internal audit be conducted. The allegations became public, i.e., brought to the Board's attention and published in the local press sometime in March or early April. Appleby denied that he was embarrassed by the allegations.

On March 8, 1982, Kane first came in contact with Sarracen. Sarracen called her to tell her that she was going to lose her job be-

cause of Sarracen's prior comments about the improprieties at Edgewater-Uptown. Kane did not know how Sarracen learned of Kane's activities.

Sometime later in March, perhaps on March 9, Sondler came to CAM for a regular monthly monitoring visit with Lilly. On that day, Lilly told her that Sarracen had indeed worked at Edgewater-Uptown. Lilly and Sondler testified that Lilly told Sondler that CAM would keep Sarracen on through a probationary period. Sondler said that was fine with her. Both she and Lilly testified that Sondler never told Lilly to fire Sarracen. Lilly also told her that Sarracen wanted to talk to Sondler about it; Sondler replied that because she had no power to fire Sarracen, it would be inappropriate for her to interfere by talking with Sarracen. Sondler testified that she knew about Sarracen's comments about Edgewater-Uptown, but that she was not embarrassed by them. She also testified that she called Portis to reiterate

that she had no interest in whether Sarracen was fired or retained.

During this time Lilly tried to get some more evaluations of Sarracen so that she could convince Portis to keep her. John Miller, an officer at the Salvation Army, gave a positive recommendation, but Lilly discounted it because this was not mental health work. Lilly unsuccessfully tried to call Price before March 18 and to talk to someone at Back of the Yards. She also called Dr. Kopera and Joan May from Edgewater-Uptown. May said that Glickberg's evaluation of Sarracen was essentially correct and she refused to give any additional information. Kopera said there "had been some problems." Lilly was not surprised that Edgewater-Uptown gave her bad recomendations.

At a meeting on March 18 of mental health professionals from all agencies in the Department of Mental Health's Subregions, Lilly saw both Sondler and Price. Lilly testified that she asked Price about Sarracen, and Price said

she had "some problems" with Sarracen, and she made a negative gesture. Lilly did not ask Price what she meant because they were in the middle of a large crowd. Price testified that she recalled the conversation, but she did not recall saying anything disparaging about Sarracen.

Price admitted that she very rarely included any negative information in a recommendation letter. In the letter Price wrote for Sarracen, Price failed to include the problems that Sarracen had had at Back of the Yards accepting supervision and trusting her supervisors because they were unfavorable comments. She also failed to include that Sarracen had left her job at Back of the Yards after receiving a bad evaluation and had filed a national origin discrimination suit against the City of Chicago.

At the March 18 meeting, Lilly also casually spoke with Sondler, although she admitted that in her deposition she stated that at this time she and Sondler "were concerned about the Sarracen

matter," and that she had informed Sondler that they were checking Sarracen's references. Sondler did not recall if she had spoken with either Lilly or Price at the March 18 Ravenswood meeting although she agreed that she had admitted at her deposition that the March 18 meeting was important enough that she had listed it in her notes used during the deposition.

Portis testified that he first learned about the problem with Sarracen when Lilly called him in early March. This contradicts Sondler's statement that she called him on February 25 or 26 to tell him what she told Lilly. Portis testified that he called Price and Kopera, both of whom said that there had been "some problems" but would give no details. Price did not recall talking to Portis. Portis admitted that he testified in his deposition that Price told him Sarracen was an unsatisfactory and unfavorable employee. He also went through CAM's personnel file on Sarracen and found that Sarracen had omitted Edgewater-Uptown. He discussed the

matter once with Sondler sometime between March 9 and March 19. Sondler said nothing regarding the termination of Sarracen or any possible embarrassment to herself or Appleby because of Sarracen's statements about Edgewater-Uptown. According to Portis, neither Appleby or Sondler told him to fire Sarracen; in fact, no one at the Department of Mental Health could order CAM officials to fire anyone.

After talking with these persons, Portis decided to think about the Sarracen matter for a few days. He resolved to fire her because of the false information she had given, because Price and Kopera had given somewhat negative references, and because Sarracen was only a probationary employee. He testified that he was not aware of Sarracen's allegations concerning Edgewater-Uptown when he made this decision. He told Lilly on March 19 that she should terminate Sarracen.

On March 19, Lilly called Sarracen into her office to tell her that Portis was going to

fire Sarracen for falsifying her employment application. Lilly testified that Sarracen first agreed to resign; but then, on March 22, she told Lilly they would have to fire her. Sarracen claimed she never agreed to resign. Sarracen testified that she was "very upset, very angry at the whole thing." Sarracen left Lilly's office and went to her own office. Helen Glick, a co-worker, came in and found her crying. Glick testified that Sarracen seemed "somewhat upset." Sarracen told Glick that she had been fired, but she did not tell her why. Glick drove her home and on the way, Sarracen told her about the memo she had written criticizing Edgewater-Uptown.

On March 22, Portis gave Sarracen a letter stating that as of April 6, 1982 she was terminated from CAM because she had lied about her last place of employment. At a staff meeting the next day, one of the therapists asked why Sarracen had been terminated. Lilly told him that it was because Sarracen's references had not cleared personnel. Lilly and Portis testi-

fied that notwithstanding the reasons given in the termination letter, Sarracen was also fired because her references did not clear personnel.

Sondler met with Lilly again for another monitoring meeting on March 23. At that meeting, Lilly told her that Portis had decided to terminate Sarracen because she had falsified the employment application. Sondler, who had never seen the application, testified that she was surprised because she had been under the impression that they would keep Sarracen on as a probationary employee.

A few weeks after Sarracen left CAM, she worked temporarily at Pilsen Village Emergency Mental Health Center, earning approximately $11,000 per year. She left that job at the end of August and began working for the Chicago Board of Education in September for $20,000 for a ten month period. Her salary at CAM was $17,000 per year. After working at CAM she never applied for any other jobs in her "chosen field" because she felt that Glickberg's evalu-

ation had "professionally damaged her." She also suggested (although the record is unclear) that she might seek such a job once the instant litigation had settled down.

Portis and Appleby testified that CAM received 98% of its funds from the Department of Mental Health. Portis admitted that this probably gave the Department "a lot of say so" in certain of CAM's operations, but both he and Appleby stated that Appleby never threatened to close his agency. According to Appleby and Portis, Appleby had no authority to close CAM, or cut off CAM's funding. Although Appleby could recommend that funding be reduced, the ultimate decision was made by the Department's Board of Directors. Both Appleby and Portis admitted that in 1979-1980 the Department requested CAM to make several changes to resolve financial difficulties, but Portis did not interpret these requests as a threat to cut off funding. CAM complied with the requests and no funding was cut.

II

At trial, Sarracen was permitted to testify that early in March Lilly called her into her office and told her "that Appleby had called Portis and ordered him to fire...(Sarracen) because of the comments...(she) had written criticizing Edgewater-Uptown and that it could hurt him...he was going to...tell other people that... (she) was fired...because (she) omitted information in...(her) resume." Sarracen's former coworker, Glick, was permitted to testify that on March 19, after she drove Sarracen home, she confronted Lilly asking for the reason that Sarracen had been fired. Lilly told Glick that Sarracen was terminated because of a memorandum she had written while at Edgewater-Uptown. According to Glick, Lilly said, "Miss Sarracen was being 'blackballed' by someone at Subregion 5, and that Marge (Sondler) had been insisting for about a month that Miss Sarracen be terminated from the agency."

Both Sondler and Appleby objected to the

admission of these statements on the basis that they were hearsay. The trial judge admitted the evidence under Fed. R. Evid. 801(d)(2)(F). That rule provides: "A statement is not hearsay if--... (t)he statement is offered against a party and is...a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." To admit evidence under this rule, the trial judge must determine that (1) a preponderance of evidence independent of the admission establishes a conspiracy; (2) the declarant and the persons against whom the statement is offered were members of the conspiracy; and (3) the statements were made during the course of and in furtherance of the conspiracy. United States v. Xheka, 704 F 2d 974, 975 (7th Cir., 1983)

Defendants make several arguments why we should reverse the district court's decision to admit the evidence. First, defendants contend that the district judge erroneously ruled that the proper standard to determine if the

plaintiff had sufficiently proved a conspiracy was "whether a reasonable jury could find that the plaintiff has by a preponderance of the evidence established a conspiracy." Second, defendants argue that there was insufficient independent non-hearsay evidence of the conspiracy and that Lilly's statement to Glick was made after the alleged conspiracy had ended. We do not reach either of these arguments because we agree with defendants that neither of Lilly's alleged statments were made "in furtherance of the conspiracy."

Although there has been extensive debate about the desirability of the "in furtherance" requirement, see United States v. Green, 600 F 2d 154, 157 (8th Cir., 1979); J. Weinstein & M. Berger, 4 Weinstein's Evidence, 801(d)(2)(E) (01) at 801-238 (1982), this court has consistently held that the in furtherance requirement must be satisfied before a hearsay statement may finally be admitted under Fed. R. Evid. 801(d)(2)(E). See, e.g., Xheka, 704 F 2d at 985.

See also, Dutton v. Evans, 400 US 74, 81 (1970); Wong Sun v. US, 371 US 471, 490 (1963); Krulewitch v. US, 336 US 440, 443-44 (1949). See generally, J. Weinstein & M. Berger, Supra, at 801(d)(2)(E)(01) at 801-169-172.

To satisfy this requirement, the party offering this statement must demonstrate that "some reasonable basis exists for concluding that the statement furthered the conspiracy." Xheka, 704 F 2d at 985. A statement furthers the conspiracy when it advances the objective of the conspiracy. Id. at 986.

Plaintiff's claim was essentially that the four defendants conspired to dismiss her from CAM because of the remarks that she had made about Edgewater-Uptown. This was the main, if not the only, illegal objective of the conspiracy. Thus, to be admissible, Lilly's statements to Sarracen and Glick must have furthered the objective. We believe that in this case no such reasonable basis existed to conlcude that either Lilly's remarks to Sarracen or her remark to

Glick could possibly have been intended to aid in the termination of plaintiff. In our view, Lilly's statements were nothing more than "casual comments which were neither intended to further nor had the effect of furthering the conspiracy in any way." Green, 600 F 2d at 158; see also United States v. Moore, 522 F 2d 1068, 1077 n.5 (9th Cir., 1975), cert. denied, 423 US 1049 (1976). They merely explained what Lilly thought might be the reasons for Sarracen's termination.

In fact, these statements, if true, were probably intended to have the opposite effect. Lilly purportedly revealed the illegal conspiracy to the target of the conspiracy and to a woman she testified did not like her very much. The likely result would be that Sarracen or Glick would report the matter to other authorities. In addition, Lilly testified at length that she liked Sarracen and wanted to keep her; perhaps she intended by the statements to help Sarracen protect herself.

Thus, at best, Lilly's statements were nothing more than "(a) casual admission of culpability to someone (the declarant) had individually decided to trust," United States v. Eubanks, 591 F 2d 513, 520 (9th Cir., 1975), or a narrative description of events that had transpired and, as such, they were clearly inadmissible under Fed. R. Evid. 801(1)(d)(E). United States v. Howard, ___ F 2d ___ (6th Cir., 1984); Xheka, 704 F 2d at 785; Eubanks, 591 F 2d at 520; United States v. Lang, 589 F 2d 92, 100 (2nd Cir., 1978).

Plaintiff argues that Lilly's statements were made in furtherance of the greater conspiracy to "blackball" the plaintiff and to intimidate her and others from speaking out against "the system." Plaintiff's argument fails for two reasons. First, plaintiff never argued at trial that a main objective of the conspiracy was to prohibit plaintiff and other mental health workers from making any statements about their employees. The complaint merely alleged

that the defendants conspired to fire her in retaliation for her comments about Edgewater-Uptown, comments that allegedly embarrassed Appleby. True, the complaint does not circumscribe the bounds of the conspiracy that may be proved at trial, see Green, 600 F 2d at 157; nonetheless, the complaint does give a clue as to the plaintiff's main complaint.

More importantly, however, almost all of the evidence adduced at trial went exclusively to the issue of whether defendants were retaliating against Sarracen because of the Edgewater-Uptown allegations. Little evidence, apart from the disputed statements themselves, even suggested that the defendants were generally intent on suppressing their employee's First Amendment rights.

The second reason plaintiff's argument fails is that only these two statements hinted at a larger conspiracy to blackball plaintiff and coerce CAM's and the defendants' employees to be quiet about employer illegalities. It is

well settled that a conspiracy must be proved by a preponderance of non-hearsay evidence before the hearsay statements can be admitted. Xheka, 704 F 2d at 985. That requirement has not been met here.

Plaintiff argues that even if the statements were improperly admitted, the evidence of the defendants' guilt was so overwhelming that the judgement should be affirmed. We do not agree. We believe that these statements were crucial to establishing that Appleby and Sondler were involved in the conspiracy to terminate Sarracen for her prior comments.

The only evidence against Appleby was that he learned of Sarracen's application for a job at CAM from Sondler when he was in Sondler's office for a routine meeting. Inadvertently, he learned that Sarracen had worked at Edgewater-Uptown, not Back of the Yards, until January, 1982. There was some discrepancy in his testimony about when he first learned about this problem, but this discrepancy was not crucial

and did not affect the balance of his testimony. He passed this information on to Sondler with instructions to tell CAM to check into it. According to the three other defendants, after this date, Appleby never again spoke to them about this matter. Approximately a week later, Appleby met with Kane to discuss problems at Edgewater-Uptown. Although Kane claimed that Appleby requested the names of the informants and Appleby denied this, both testified that Sarracen's name was never once mentioned during the meeting. Appleby testified that he first learned of Sarracen's comments approximately two weeks after this date. His testimony was corroborated by the testimony of Kopera. None of this evidence strongly shows that Appleby ever was in contact or agreement with either Sondler, Lilly, or Portis to fire Sarracen. True, the jury could infer that Appleby learned about Sarracen's allegations from Sunukjian or Kopera when he spoke with them in early February and that he was prompted to take action be-

cause of Kane's allegations. But without Lilly's alleged statement to Sarracen, there is nothing linking Appleby to Portis' decision to terminate Sarracen other than the fact that the Department of Mental Health funded CAM, that Appleby may have felt his job was in jeopardy due to the Department's reorganization, and that Appleby exercised some authority over Edgewater-Uptown. This was the only evidence that supported Sarracen's theory that Appleby called Sondler on March 5 and that Sondler also called Lilly on March 5, rather than on February 25 or 26 as the defendants claim.

The evidence against Sondler was similarly weak without the disputed statements. Appleby informed Sondler about the problem. Sondler told Lilly and Portis about it sometime during the week of February 22. Sondler again spoke with Lilly about it during a monthly monitoring meeting at CAM on March 9, in which various other matters were discussed, possibly again on March 18 in a meeting conversation at Ravenswood,

and again on March 23 at another monitoring meeting. Although it is unclear, the matter appears to have been casually discussed during the course of routine business meetings.

This evidence does not suggest that Sondler was unusually preoccupied with the Sarracen matter or that she had an agreement with either Portis or Lilly to fire Sarracen. The jury might possibly have concluded that Sondler was exhibiting an inordinate amount of interest in the matter. But without Lilly's alleged statement to Glick, there was no strong evidence that Sondler cared one way or the other whether Sarracen was terminated.

We are not saying that the evidence without the hearsay statements could not have supported a verdict in favor of the plaintiff. The district judge correctly noted that it was suspicious that Portis waited almost a month after he found out about Sarracen to terminate her and that he terminated her notwithstanding the fact that she was a good employee and that she

generally had received good written recommendations. In addition, both Lilly and Portis equivocated so much in their trial and deposition testimony that the jury could easily conclude that these two defendants were lying. The evidence suggested that they both had something to hide regarding Sarracen's termination. But the evidence against Sondler and Appleby was circumstantial and attenuated, and these two defendants rarely were impeached by discrepancies in their testimony. Portis may have decided to terminate Sarracen for reasons wholly unrelated to Appleby or Sondler; for example, he may have viewed Sarracen as a troublemaker because whenever she received an unfavorable evaluation of her work, she apparently retaliated by criticizing the employer or by taking legal action. Thus, we believe that without the disputed hearsay statements that directly implicated Sondler and Appleby, the jury might have found for them.

The admission of these statements was not harmless error because it also may have substan-

tially affected the damage award. Sarracen was initially awarded $110,000 in compensatory damages, which was later reduced to $30,000. She claimed that even though she only lost less than $10,000 in wages, she had suffered mental humiliation and that, because of defendants' actions, she was unable to work in her chosen field. The only evidence that plaintiff suffered emotionally was her own testimony that she cried and that she was very angry; and Glick's testimony that Sarracen was upset and angry.

Sarracen also testified at trial that after leaving CAM she had never even attempted to look for another job, presumably because of the adverse job evaluation by Glickberg, her supervisor at Edgewater-Uptown. The only evidence that the defendants in this lawsuit had precluded Sarracen from working in the mental health field was Glick's statement that Lilly told her that Sarracen was being blackballed and perhaps Lilly's statement to Sarracen, if it is interpreted as an attempt to intimidate Sarracen.

Thus, based on all the evidence presented at trial, excluding these two hearsay statements, plaintiff probably could not have recovered damages for mental or emotional distress. See Nekolny v. Painter, 653 F 2d 1164, 1172-73 (7th Cir., 1981) (plaintiffs' statements that they were "very depressed," despondent, completely humiliated or unable to work for six weeks insufficient to establish a compensable injury).

Plaintiff was also initially awarded $301,000 in punitive damages, $150,000 each against Sondler and Appleby and $500 each against Lilly and Portis. The relatively large jury award against Sondler and Appleby is somewhat suspect because Sondler and Appleby were the State defendants and because most of the evidence presented at trial pointed to Lilly and Portis as the real wrongdoers. Thus, the jury verdict appears to have been somewhat tainted by prejudice. More important for present purposes, however, Lilly's alleged hearsay statements easily could have caused the jury to increase the size

of the punitive damage award against Sondler and Appleby.

Thus, we hold that the error in admitting the two hearsay statements by Lilly was not harmless. Accordingly, we reverse the judgement as to defendants Appleby and Sondler and remand for a new trial.